

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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State of North Dakota, et al.

Appeal Nos. 14-2156 & 14-2251

Appellees,

v.

Beverly Heydinger, Commissioner and Chair,  
Minnesota Public Utilities Commission, et  
al.,

Appellants.

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ON APPEAL FROM  
UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
Civil No.: 11-cv-03232-SRN  
The Honorable Susan R. Nelson

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**APPELLEES/CROSS-APPELLANTS' SUPPLEMENTAL ADDENDUM**

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**OVERVIEW OF “PERSONS”**

**SUBJECT TO**

**MINN. STAT. § 216H.03**

**Previously submitted by  
Appellees/Cross-Appellants**

**to the  
District Court  
(ECF 25)**

## INTRODUCTION

Plaintiffs respectfully offer this supplemental submission pursuant to the Court's request for further background as to the "players" in the electricity industry who, in turn, are the "persons" subject to the "no person shall" prohibitions, terms, and conditions imposed by Minnesota Statutes section 216H.03, subdivisions 3 and 4 of the Next Generation Energy Act ("NGEA"). (April 12, 2012 Hrg. Tr. 37:1-4) (ECF Doc. 22) Accompanying this supplemental submission, Plaintiffs have included a chart entitled "Electricity Industry Overview With Entity Examples," that exemplifies the types of industry functions and entities described below; three illustrations of real life examples; and a glossary of relevant terms taken from public sources. These materials demonstrate the complex and fragmented nature of the industry, and the variety of entities and regulators involved in importing electricity generated by "new large energy facilities" and transacting "long-term power purchase agreements" for electricity imported from other states. These facts belie the simplistic characterization of the industry presented by Defendants, and demonstrate the breadth of the "persons" to whom the NGEA's restrictions, terms, and conditions plainly apply.

### **I. THE TYPICAL FUNCTIONS OF ELECTRICITY INDUSTRY PLAYERS.**

The electric utility industry generally involves three functions: generation, transmission, and distribution. To the extent carbon emissions occur, those emissions occur as part of the generation of electricity. Once electricity is generated and injected into the power grid, it is a fungible commodity and there are no qualitative differences based on the source from, or method by, which the electricity has been generated.

Electricity, having been generated, becomes subject to the transmission function, which involves the wholesale delivery process and commonly involves interstate transmission of electricity from generation utilities to distribution utilities. The retail distribution function involves the actual delivery of the electricity to the end consumer and typically occurs intrastate.

Correspondingly, every power transaction typically involves three categories of “players”: a generation provider, a transmission provider, and a retail distributor. Sometimes these providers are all the same entity, but many times they are not. The Federal Energy Regulatory Commission (“FERC”) exclusively regulates the terms, conditions, and rates for the wholesale price of electricity, and it also regulates the price and terms of service of all interstate transmission of electricity. States have no authority over these elements of the system and cannot impose their own terms and conditions.

Traditionally, states have regulated the retail distribution function occurring intrastate. For generation and transmission functions, states only have the authority to regulate very limited activities occurring exclusively in the state. For example, with the generation function, states can regulate emissions and the siting of facilities within their borders, and they also regulate retail sales of electricity. Similarly, for the transmission functions, states generally have authority in the siting of the transmission lines. Notwithstanding this limited authority, states do not have and have never had authority over the wholesale price for electricity charged by generators, nor do they have any control over the terms and conditions under which that electricity is transmitted in interstate commerce.

## **II. THE TYPICAL UTILITY CATEGORIES IN THE ELECTRIC INDUSTRY.**

As Plaintiffs have asserted in their Amended Complaint (ECF Doc. 9) and Memorandum of Law (ECF Doc. 17), the NGEA imposes restrictions, terms, and conditions that require the various entities engaged in the above-described generation and transmission functions to incur the costs of offsetting carbon emissions if the electricity they generate and/or transmit may eventually be consumed in Minnesota.

There are three general categories of utilities that are typically used to ultimately get electrical energy to end consumers: (1) Investor-Owned Utilities (“IOUs”); (2) Cooperative Electric Utilities (“Co-ops”); and (3) Municipal Electric Utilities (“Munis”). Each of these utility types generates, transmit power interstate, and/or distribute power intrastate via different facilities owned by different entities.

IOUs can be privately-owned or publicly-traded companies. Xcel Energy (based in Minneapolis, Minnesota) and Alliant Energy (based in Madison, Wisconsin) are examples of IOUs with service areas in Minnesota. IOUs can be vertically integrated, but that is not always the case. Xcel is an example of a vertically integrated IOU, whose majority of power is generated by Xcel, transmitted through transmission lines owned by Xcel, and ultimately consumed by the customers of Xcel. Alliant, in contrast, has outsourced the transmission function to ITC Transmission (based in Novi, Michigan). While IOUs are “for-profit” entities, they have specific regulatory limits on the rate of return they are allowed to receive for their retail sales.

Co-ops are owned by and operated for the benefit of those using their service. There are different types of Co-ops depending on the function that Co-op serves.

Typically, end consumers or customers are members of a Retail Co-op. Examples of Retail Co-ops include Renville-Sibley Cooperative Power Association (“RSCPA”) and Steele Waseca Cooperative Electric (“SWCE”). These Retail Co-ops deliver electricity to homes and businesses within their service area. The Retail Co-ops then, in turn, are member-owners of generation and transmission cooperatives that provide wholesale generation and transmission services. For example, RSCPA (based in Danube, Minnesota) obtains its power from East River Electric Cooperative (“EREC”) (based in Madison, South Dakota), which is in turn a member of Plaintiff Basin Electric Power Cooperative (based in Bismarck, North Dakota), a cooperative generation and transmission provider that generates and transmits electricity at wholesale to rural electric systems and distribution cooperatives. SWCE (based in Owatonna, Minnesota) is a member of Great River Energy (“GRE”) (based in Maple Grove, Minnesota), which is another generation and transmission cooperative owned by rural electric cooperatives that generates and transmits power at wholesale to its member owners.

Munis are government-owned utilities that function similarly to Co-ops. Local Munis provide retail service to customers. These Local Munis receive their generation and transmission services from not-for-profit power agencies which are generally public bodies organized under the intergovernmental cooperation laws of the states where the agency has members. For example, Melrose Municipal Power and Light is a member of Plaintiff Missouri River Basin Municipal Power Agency (based in Sioux Falls, South Dakota), which is a municipal power agent that does business as Missouri River Energy Services (“MRES”). MRES generates and purchases electricity as necessary to supply its



members at wholesale, including municipal utilities located in Minnesota. Similarly, Chaska Municipal Electric Services is a member of Minnesota Municipal Power Agency (“MMPA”). MMPA also generates and purchases electricity as necessary to supply its members at wholesale.

### **III. ADDITIONAL INDUSTRY PLAYERS.**

In addition to these three typical types of utilities, there are also other entities which are involved in the generation and transmission of electricity.

For instance, Independent Power Producers (“IPP”) generate electricity for sale at wholesale, which may take the form of long-term power purchase agreements. Examples of IPPs include Manitoba Hydro and Dynegy. There are also independent system operators that own and control transmission facilities, but do not otherwise generate or distribute power. Examples of these entities are the American Transmission Company (“ATC”) based in Waukesha, Wisconsin, and the Midwest Independent Transmission System Operator (“MISO”) which is headquartered in Carmel, Indiana. ATC owns and operates a transmission grid which covers parts of 4 states, including Minnesota. MISO provides open access transmission services and monitors the transmission grid under its control which covers all or parts of 13 states, including Minnesota. Independent system operators are tasked with, among other things, facilitating open access to the transmission grid and ensuring the safety and reliability of the regional electric system.

In addition to providing open access transmission services and monitoring the transmission grid under its control, MISO also operates an Energy Market where utilities buy energy at wholesale from MISO to supply their customers and sell energy to MISO

from their generation resources. Using a sophisticated system of gathering information from utilities regarding demand and generation, MISO establishes prices for energy that is on the MISO grid. Utilities can and do use MISO prices as a market index in utility-to-utility (i.e. wholesale) power transactions and in determining the cost associated with delivering power from one location to another location on the MISO grid. Utilities enter into Market Participant Agreements to participate in the MISO energy market and to follow the terms and conditions of the MISO tariff. There are literally hundreds of utilities, including Plaintiffs Basin Electric, Minnkota, and MRES, that receive power directly or indirectly from MISO. Unsurprisingly, a substantial portion of the energy in the MISO system is coal-generated and is transmitted interstate and sold at wholesale.

IPPs may generate electricity which they might sell into MISO that is “imported” to Minnesota or could sell to IOUs such as Xcel and thereby “import” that electricity into Minnesota through a Minnesota transmission path to the Minnesota hub.

In addition to the IPPs and the transmission providers, there are also wholesale power marketers of electricity, such as the Goldman Sachs commodities subsidiary, J. Aron & Company, which is authorized by FERC to sell wholesale physical power at market-based rates, as well as other power marketers that actually purchase and sell electricity at wholesale. There are also power pools where independent utilities might combine their generation or transmission resources pursuant to an agreement. Power pools are sometimes a substitute for having an independent system operator to coordinate generation and transmission.

#### **IV. ADDITIONAL EXAMPLES OF POWER TRANSACTIONS.**

Although all utilities that provide electrical service to end consumers generally have a primary source for their electricity, they also obtain significant portions of this electricity through various transactions. For example, although Steele Waseca Cooperative Electric receives a substantial portion of its power from Great River Energy's generation facilities, it may also obtain power purchased from other new large energy facilities owned by others. So, in that example, in addition to receiving power generated by GRE, SWCE could also purchase power generated by Dynegy (an IPP) which is then transmitted (imported) through lines owned by GRE before ultimately being distributed by SWCE to its customers. Every component of this transaction, other than the retail distribution from SWCE to its customers, is under the jurisdiction of FERC. The wholesale rates paid for the purchase from Dynegy, as well as the rates paid for the transmission through and use of GRE's transmission lines (also known as "wheeling") are submitted to, reviewed by and approved by, FERC.

#### **CONCLUSION**

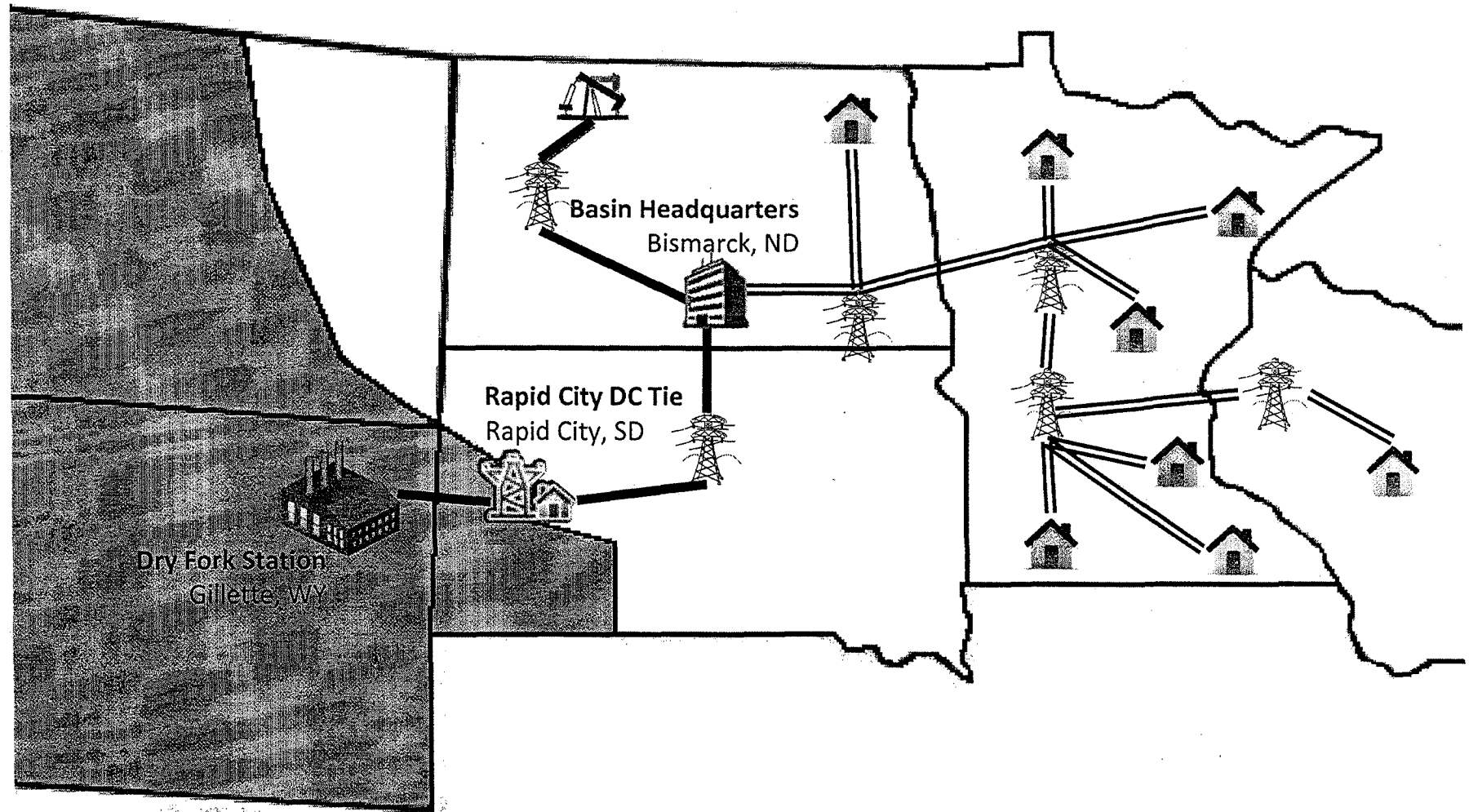
The NGEA's "no person shall" restrictions do not exempt any of the categories and types of utilities or generation and transmission entities and activities described in this supplemental submission. As enacted, the NGEA places restrictions, terms, and conditions on all of these interstate transmission and wholesale entities and activities to the extent the subject electricity is eventually consumed in Minnesota.

Electricity Industry Overview With Entity Examples

Industry Function	Wholesale	Generation	Xcel	Alliant	Basin Electric	Great River Energy	MRES*	MMPA*	MHEB (IPP)	Dynegy (IPP)		REGULATED BY FERC
		Transmission	Xcel	ITC (Alliant)	Basin Electric	Great River Energy	MRES	MMPA	MISO	ATC	J. Aron & Company	
	Retail	Retail Distribution	Xcel	Alliant	RSCPA (EREC)	SWCE	Melrose	Chaska				SELF-REGULATED OR STATE-REGULATED
			Investor Owned Utilities		Cooperative Electric Utility		Municipal Electric Utility		Other			
			Corporate Form									

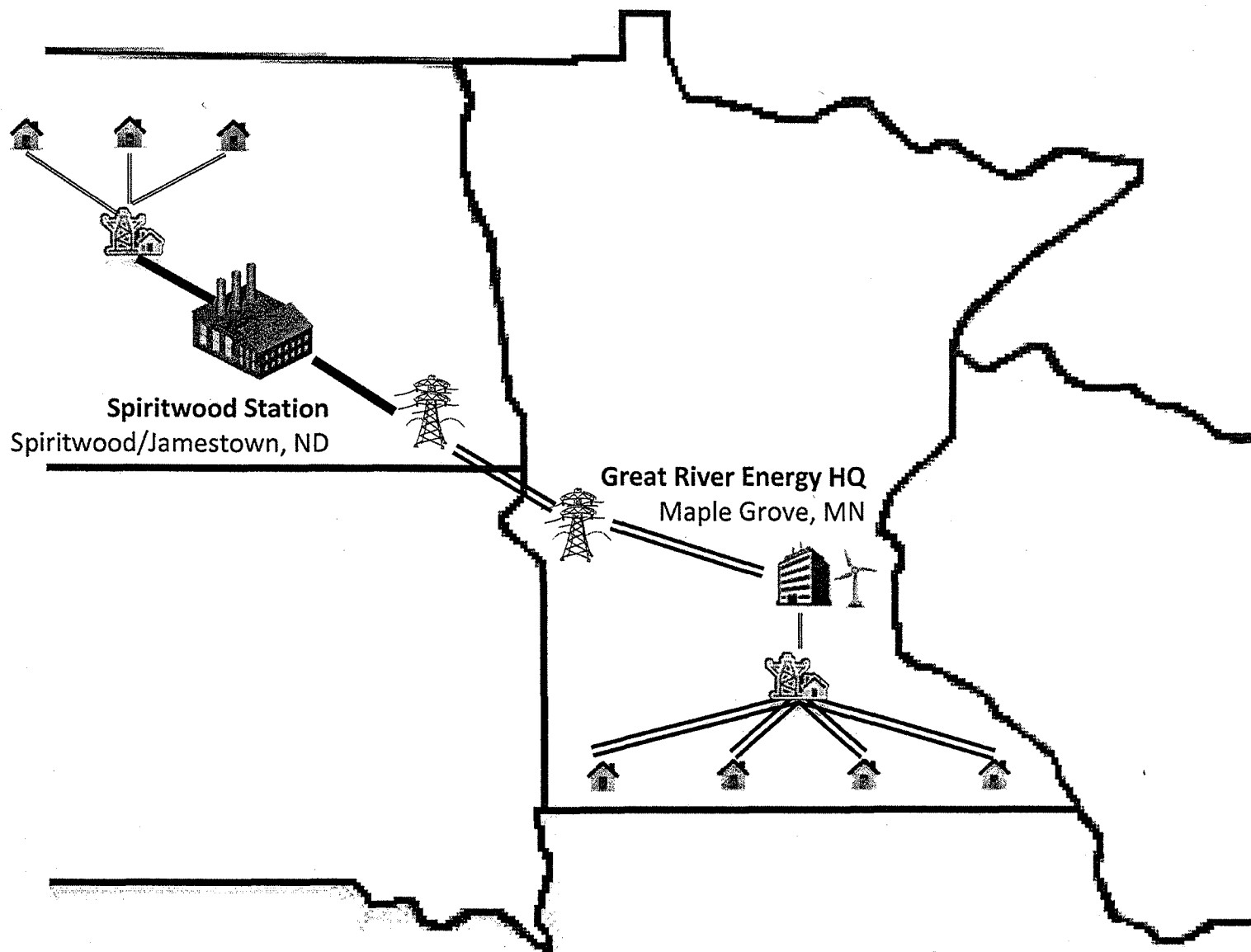
\* Self-regulated to the extent not otherwise regulated by FERC.

# Illustration 1: Basin Electric



Dry Fork transaction described in Amended Complaint (ECF Doc. 9) at ¶¶ 43-47 and Plaintiffs' Memorandum of Law (ECF Doc. 17) at 10-11.

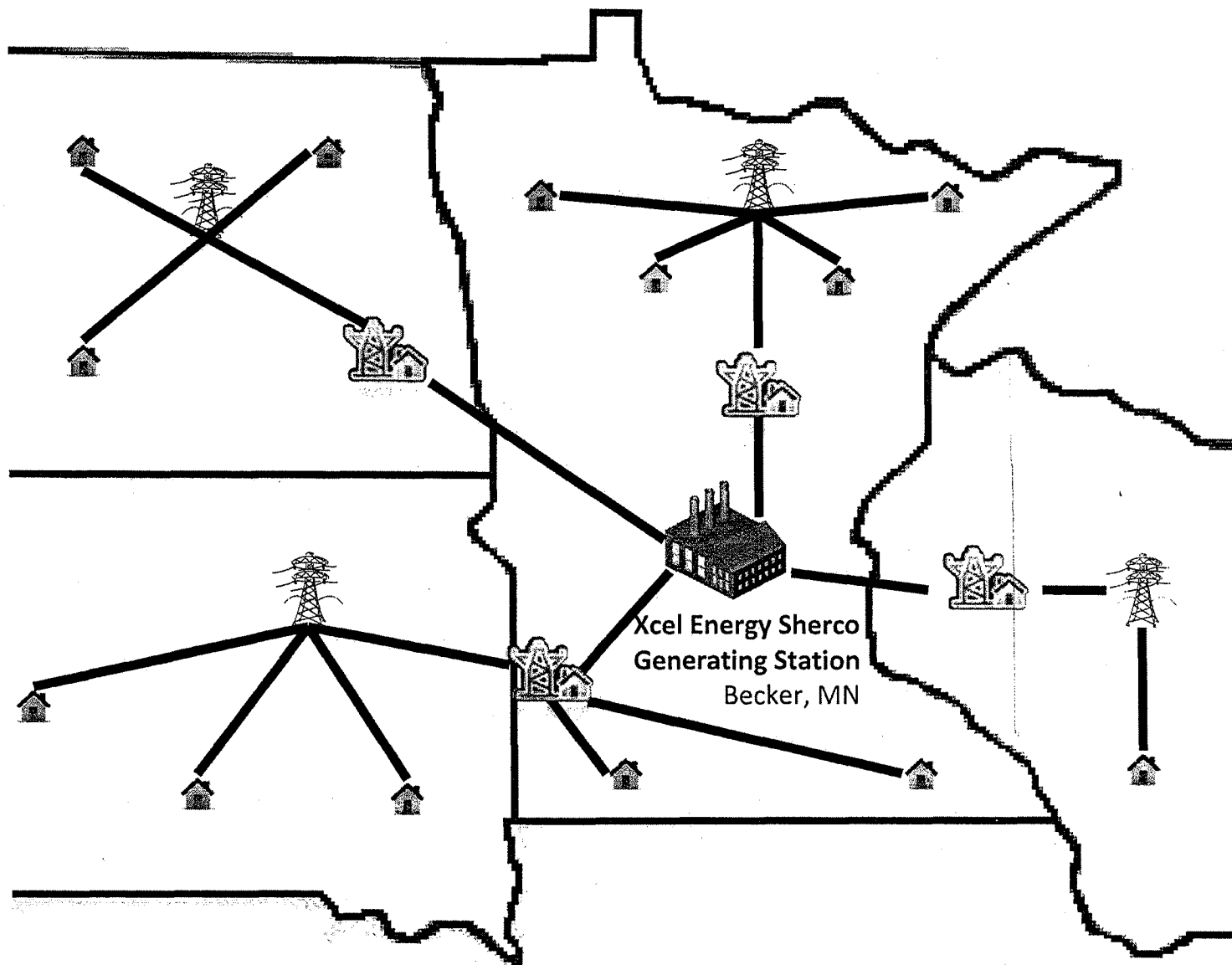
## Illustration 2: GRE/Spiritwood



Spiritwood Station described in Amended Complaint (ECF Doc. 9) at ¶¶ 71-75 and Plaintiffs' Memorandum of Law (ECF Doc. 17) at 14-15.



### Illustration 3: Investor-Owned Utilities



Vertically-integrated Investor-Owned Utility, e.g., Xcel (as opposed to Alliant), as described in Plaintiffs' Supplemental Submission at 4.

### Glossary of Selected Terms

Cooperative electric utility - An electric utility legally established to be owned by and operated for the benefit of those using its service. The utility company will generate, transmit, and/or distribute supplies of electric energy to a specified area not being serviced by another utility. (<http://www.eia.gov/tools/glossary/index.cfm?id=C>)

Electric Utilities - All enterprises engaged in the production and/or distribution of electricity for use by the public, including investor-owned electric utility companies; cooperatively-owned electric utilities; government-owned electric utilities (municipal systems, federal agencies, state projects, and public power districts). (Source: <http://www.ferc.gov/help/glossary.asp>)

Electricity broker - An entity that arranges the sale and purchase of electric energy, the transmission of electricity, and/or other related services between buyers and sellers but does not take title to any of the power sold. (<http://www.eia.gov/tools/glossary/index.cfm?id=E>)

Independent Power Producer (IPP) - A corporation, person, agency, authority, or other legal entity or instrumentality that owns or operates facilities for the generation of electricity for use primarily by the public, and that is not an electric utility. (Source: <http://www.ferc.gov/help/glossary.asp>)

Investor-owned utility (IOU) - A privately-owned electric utility whose stock is publicly traded. It is rate regulated and authorized to achieve an allowed rate of return. (<http://www.eia.gov/tools/glossary/index.cfm?id=I>)

Generation - The act of producing electrical energy from other forms of energy (such as thermal, mechanical, chemical or nuclear); also, the amount of electric energy produced, usually expressed in kilowatthours (Kwh) or megawatthours (MWh). (Source: <http://www.ferc.gov/help/glossary.asp>)

Independent System Operator - An independent, Federally regulated entity established to coordinate regional transmission in a non-discriminatory manner and ensure the safety and reliability of the electric system. (Source: <http://www.ferc.gov/help/glossary.asp>)

Interstate - Sales where transportation of natural gas, oil, or electricity crosses state boundaries. Interstate sales are subject to Federal Energy Regulatory Commission jurisdiction. (Source: <http://www.ferc.gov/help/glossary.asp>)

Intrastate - Sales where transportation of natural gas, oil, or electricity occur within a single state and do not cross state boundaries. Intrastate sales are not subject to Federal Energy Regulatory Commission jurisdiction. (Source: <http://www.ferc.gov/help/glossary.asp>)



<http://www.ferc.gov/help/glossary.asp>)

Open Access – FERC Order No. 888 requires utilities to allow others to use their transmission and distribution facilities, to move bulk power from one point to another on a nondiscriminatory basis for a cost-based fee. (Source: <http://www.ferc.gov/help/glossary.asp>)

Power Marketer - Business entities engaged in buying and selling electricity. Power marketers do not usually own generating or transmission facilities. Power marketers, as opposed to brokers, take ownership of the electricity and are involved in interstate trade. These entities must file with the Federal Energy Regulatory Commission to obtain status as a power marketer. (Source: <http://www.ferc.gov/help/glossary.asp>)

Power Pool - An association of two or more interconnected electric systems having an agreement to coordinate operations and planning for improved reliability and efficiencies. (Source: <http://www.ferc.gov/help/glossary.asp>)

Rate Schedule - The rates, charges, and provisions under which service is supplied to the designated class of customers. (Source: <http://www.ferc.gov/help/glossary.asp>)

Retail Sales - Sales made directly to the customer that consumes the energy product. (<http://www.ferc.gov/help/glossary.asp>)

Sales for Resale - A type of wholesale sales covering energy supplied to other electric utilities, cooperatives, municipalities, and Federal and state electric agencies for resale to ultimate consumers. (<http://www.ferc.gov/help/glossary.asp>)

Tariff - A compilation of all effective rate schedules of a particular company or utility. Tariffs include General Terms and Conditions along with a copy of each form of service agreement. (<http://www.ferc.gov/help/glossary.asp>)

Transmission - Moving bulk energy products from where they are produced or generated to distribution lines that carry the energy products to consumers. (<http://www.ferc.gov/help/glossary.asp>)

Wheeling - The transmission of electricity by an entity that does not own or directly use the power it is transmitting. (<http://www.ferc.gov/help/glossary.asp>)

Wholesale Sales - Sales for resale in bulk power markets, natural gas, and oil. (<http://www.ferc.gov/help/glossary.asp>)

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